

SERVICE DATE - LATE RELEASE NOVEMBER 10, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC.–CONSTRUCTION  
AND OPERATION–WESTERN ALIGNMENT

Decided: November 10, 2003

In a decision served July 7, 2003, the Board established a procedural schedule for parties to file comments and replies to the supplemental evidence Tongue River Railroad Company (TRRC)<sup>1</sup> filed on May 1, 2003. The decision also advised anyone interested in becoming a party of record to file a notice of intent to participate with the Board within 10 days of the service date of that decision. Based on these responses, the Board issued an updated service list in a notice served October 3, 2003. That notice also triggered the procedural schedule for the submission of pleadings established by the Board in the July 7 decision. Pursuant to that schedule, parties must file comments responsive to TRRC's May 1 supplemental evidence by November 12, 2003, and TRRC must file its reply by December 2, 2003. There have been no requests for extensions of these deadlines.

On November 5, 2003, TRRC filed a Motion for Protective Order (Motion) to quash a Notice of Deposition (Notice) served on it by Northern Plains Resource Council, Inc. (NPRC) on October 31, 2003. In the Notice, a copy of which was attached to TRRC's motion, NPRC notified the other parties of record that it would depose Mike Gustafson, TRRC's President, on November 11, 2003.<sup>2</sup> NPRC filed a reply to the Motion on November 6, 2003.

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<sup>1</sup> In a decision served September 2, 2003, the Board allowed Tongue River Railroad Company, Inc. to be substituted for Tongue River Railroad Company as the applicant in the Tongue River III proceeding. The United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board jointly filed a petition for reconsideration of that decision on September 22, 2003. That petition is under administrative review. In the instant decision, the applicant/petitioner will be referred to collectively as TRRC.

<sup>2</sup> TRRC also attached copies of correspondence to parties of record from NPRC's counsel stating that counsel would be amenable to alternative dates for the deposition if the parties stipulate and the Board agrees to keep the record open to receive Mr. Gustafson's deposition.

TRRC's primary argument is that taking Mr. Gustafson's testimony at this time is inappropriate because it will not lead to admissible evidence that may be timely presented to the Board in an evidentiary submission. TRRC notes that NPRC's reply to the supplemental evidence is due the day after NPRC proposes to take the deposition, and maintains that there is no realistic prospect that the deposition could yield anything that could be included in that reply. TRRC asserts that NPRC's deposition of Mike Gustafson would be an undue burden of time and expense on TRRC because it cannot result in any evidence admissible under the Board's procedural schedule.

The Motion will be denied. Although NPRC should and could have engaged in discovery more promptly, there is no basis for ruling out altogether the opportunity for NPRC to depose Mr. Gustafson. Mr. Gustafson has already submitted two verified statements in this proceeding, and his deposition may yield information that NPRC finds important. Whether any information gleaned from Mr. Gustafson's deposition is ultimately admissible into evidence is not now before the Board. If NPRC does seek to submit any additional evidence, the Board will determine its admissibility at that time. TRRC's arguments are premature in this regard.

TRRC states that Mr. Gustafson will not be available on Tuesday, November 11, 2003. The parties are urged to find a mutually agreeable time and place for the deposition. Comments and replies to TRRC's May 1 supplemental evidence remain due by November 12, 2003.

It is ordered:

1. The motion for a protective order is denied.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary